

Appeal from letter decision of the Idaho State Office, Bureau of Land Management, suspending timber sale contract ID-030-TSO-015.

Affirmed.

1. Timber Sales and Disposals

Where a contract for the sale of timber contains a disclaimer of warranty by the vendor as to the quantity of timber sold, the parties are deemed to have contracted on the assumption that there was doubt as to the quantity, and the risk with respect to such factor must be considered to have been assumed by the purchaser as one of the elements of the bargain.

2. Timber Sales and Disposals

Where warranty as to quality and quantity is specifically disclaimed by the Government in a timber cruise sale contract, only good faith is required of the Government in naming an estimated amount.

APPEARANCES: Jack C. Voshell, Esq., Idaho Falls, Idaho, for appellant;
O'dell A. Frandson, District Manager, Idaho Falls District, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Robert H. Barker appeals from a suspension of a timber sale contract imposed in a letter decision by the Idaho Falls District Manager, Bureau of Land Management (BLM), on December 30, 1980, for nonpayment of \$1,147.20

pursuant to the contract. 1/ Appellant, on appeal, contests that any amount of payment is due.

The contract, styled "Contract for the Sale of Timber, Lump Sum Sale," was dated May 28, 1980, and provided for the sale to appellant of an estimated 239 MBF of timber within T. 14 N., R. 43 E., sec. 2, NE 1/4, NW 1/4. The original sale price, \$3,824, was adjusted to \$3,582 prior to the sale because 100 trees (out of an estimated 1,582) were found to be on private land.

According to the record, appellant's last installment payment in the amount of \$382.40 was made on December 24, 1980. At this point, appellant had paid a total of \$2,434.80. 2/

The suspension, imposed 6 days later, is apparently the result of a disagreement as to the amount of timber removed and money owing by appellant. The suspension advised appellant as follows:

Any material removed from the contract area after * * * [December 30, 1980] will be considered a trespass. Requirement for settlement of this suspension notice is full remaining contract payment of \$1,147.20. if no settlement is made within 30 days after receipt of this notice, trespass damages will be filed against you to recover damages to the government." 3/

On January 28, 1981, appellant met with BLM officials to discuss BLM's demand for payment of the balance due on the contract (\$1,147.20). Claiming that the volume he had removed from the sale area was 37 percent less than the volume stated in the contract, appellant took the position that he was not obligated to pay the balance of the price. BLM's position was that the volume

1/ BLM's letter decision stated:

"Dear Mr. Barker:

"As of 12:00 p.m., December 30, 1980, you are suspended from all rights to contract ID-030-TSO-015. Any material removed from the contract area after the above stated time and date will be considered a trespass. Requirement for settlement of this suspension notice is full remaining contract payment of \$1147.20. If no settlement is made within 30 days after receipt of this notice, trespass damages will be filed against you to recover damages to the government.

"A copy of this suspension notice has been sent to our State Office in Boise and to the company that has supplied the bond for this sale.

"If you have any questions concerning this demand made of you, please contact Gale Green or bill Cook at 529-1020.

"Sincerely,

"[/s/]

"Richard L. Manus

"Acting District Manager"

2/ This figure is based on BLM's payment record.

3/ This action was taken in conformance with section 10 of the contract which provides authority to suspend or cancel the contract for violations of its terms.

cut and removed was approximately 22 percent less than the stated contract volume. BLM officials advised appellant that he could either pay the balance due and appeal the volume to this Board, or refuse to pay the balance due, in which event BLM would cancel the contract and assess damages. Appellant, for the time being, took neither of those actions. Instead, he proposed a compromise to settle the matter. He suggested that if BLM had used the proper formula for estimating the quantity of timber, the quantity would have been 186.8 MBF, and the total price \$2,988.80, leaving appellant with a balance due of only \$313. BLM, however, refused to accede to any modification of the contract price, and this appeal ensued.

In his statement of reasons, appellant contends that he has actually overpaid for the timber he has removed. He states:

3. The contract price per unit is \$16.00 per thousand board feet and the quantity estimated was 239 MBF and the contract price is \$3,824.00. The actual quantity cut, removed and remaining is only 148 MBF or \$2,368.00 total value and appellant has paid \$2,676.00 upon the quantity determined by weight as actually weighed except for approximately 14,000 board feet remaining and not removed.

4. The bid was made based upon assurance that if the Bureau's estimate was in error by as much as 25% that the contract would be adjusted. Though the statement was verbal, it was made by the Bureau's agents conducting the sale at that time and place and was made as a commitment notwithstanding contrary provisions in the contract.

5. The Bureau has acknowledged that the volume was determined and made a part of the sale contract based upon an improper formula and that had the proper formula been used the contract volume would have been listed at 186.8 MBF.

BLM maintains that the volume of timber cut, removed, and remaining is 184.8 MBF, 21 percent less than the volume originally estimated in the contract. BLM concedes that its sale representative stated that adjustments would be made if there was more than a 25 percent variance. BLM asserts that volume was properly obtained by standard cruising methods and the use of the best tables available at that time. BLM states that newly available tables indicate approximately 20 percent less volume than did the old tables.

The following provisions of the contract and related documents are pertinent to the appeal. The notice advertising the sale states:

THE VOLUMES LISTED herein are estimates only. * * * No sale shall be made for less than the advertised appraised price. The purchaser shall be liable for the total purchase price, without regard to the amount bid per unit even though quantity of timber actually cut or removed or designated for taking is more or less than the estimated volume, or quantity so listed.

Exhibit B (of the contract) (Lump Sum Sale) provides:

The following estimates and calculations of value of timber sold are made solely as an administrative aid for determining: (1) adjustments made or credits given in accordance with Secs. 6, 9, or 11; (2) when payments are due; and (3) value of timber subject to any special bonding provisions. Except as provided in Sec. 2, Purchaser shall be liable for total purchase price even though quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown.

Section 6 of the contract, "Inspection of Timber and Disclaimer of Warranty," provides in part:

(a) Purchaser warrants that this contract is accepted and executed on the basis of its examination and inspection of the timber sold under this contract and its opinion of the value thereof. [Emphasis added.]

(b) Government expressly disclaims any warranty of fitness of the timber for any purpose, all timber sold hereunder is accepted As Is without any warranty of merchantability by Government. Any warranty as to the quantity or quality of the timber sold hereunder is expressly disclaimed by Government. [Emphasis in original.]

BLM's volume figure of 184.8 MBF is based on a final volume determination made on January 29, 1981. BLM arrived at this figure using appellant's weight tickets, calculating average amount per load, and determining the number of loads removed and the number remaining on the site. 4/ Appellant's challenge to these figures is unsupported by data and fails to demonstrate error. Appellant is on no firmer ground when he contends that volume was determined by an improper formula. Methods of value and volume estimation are in large measure left to the discretion of BLM. See 43 CFR Subpart 5422. It is the responsibility of the bidder to acquaint himself with the salient elements, risks, or uncertainties attendant on a contractual relationship into which he may enter. Both the timber sale prospectus and the timber sale notice apprised interested parties of the methods of measurement and volume determination employed. As we observed in Gregory Lumber Co., Inc., 54 IBLA 309, 317-18 (1981):

A prospective bidder who does not feel that the method of measurement adequately assesses probable recovery can either choose not to bid or discount its bid by a factor which it feels reflects likely recovery, or conduct its own cruise by its own methods. But where a bidder has been fully informed, in advance, of the methods used to ascertain the estimates of volume and bids in reliance thereon, and that method was, in fact, utilized, that bidder cannot be heard to subsequently complain that the method, itself, was inappropriate.

[2] The Board has held that where the contract of sale contains a specific disclaimer of warranty by the vendor (Government) as to the quantity of

4/ See Jan. 29, 1981, memorandum to file.

timber sold, the parties are deemed to have contracted on the assumption that there was doubt as to the quantity. The risk with regard to such factor must be considered to have been assumed by the purchaser as one of the elements of the bargain. Gregory Lumber Co., Inc., *supra*; Alma LeBaron, Jr., 25 IBLA 164 (1976); Lloyd L. Clark, 17 IBLA 201, 81 I.D. 546 (1974); John D. Huffman, 7 IBLA 190 (1972). Where it disclaims warranty as to quality and quantity in a lump sum contract, the Government is required only to use good faith in making its estimates. Appellant has made no showing that the Government lacked good faith, and the record does not demonstrate such discrepancies between estimates and actual amounts recovered as would put good faith in issue or require reformation of the contract.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's action requiring full remaining contract payment is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

